APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-2425

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., A/K/A BOBBY BEAR, APPELLANT

Submitted May 20, 1982

Decided June 30, 1982

PER CURIAM

On May 21, 1981, the appellant, Robert Eagle Elk, Jr. was indicted for voluntary manslaughter under 18 U.S.C. §§ 1153 and 1112 (1976). On November 26, 1981, a jury returned a verdict of guilty on the lesser included offense of involuntary manslaughter, and the district court[1] entered judgment on December 11, 1981. Of the several trial court errors upon which Eagle Elk grounds this appeal only his assertion that the trial court erred in failing to suppress a statement that he made to a federal investigator following a polygraph examination concerns us on appeal. For the reasons set forth herein, we reverse.

Only a brief outline of the facts is necessary for purposes of this decision. Eagle Elk's conviction stemmed

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[1] The Honorable Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota.

from the beating death of Richard Schreiner on April 25, 1981. Eagle Elk, Schreiner, and another individual, Anthony Jacobs, were traveling together on the evening of April 25, 1981, in Eagle Elk's automobile. Schreiner was carrying a rifle. Apparently, an argument broke out between Schreiner and Eagle Elk. According to Eagle Elk, Schreiner poked him in the side with the rifle, and Eagle Elk stopped the automobile. Schreiner jumped out of the car and while threatening Eagle Elk, cocked, aimed and pulled the trigger on the rifle. When the rifle failed to fire, Eagle Elk grabbed the rifle from Schreiner and struck him in the face with a fist. Schreiner then took out a pistol and cocked the pistol while again threatening Eagle Elk. Eagle Elk struck Schreiner on the left side of the neck with the butt of the rifle. The blow knocked Schreiner to the ground. At this point, he set the rifle next to the passenger side of the automobile and took cover.

Eagle Elk testified at trial that Jacobs became involved in the affray when, as Jacobs was attempting to get out of the back seat of the car, Schreiner pushed the car door and pinned Jacobs' legs between the car door and the car. A fight between Jacobs and Schreiner then ensued in which Jacobs, brandishing a knife, slashed at Schreiner. According to Eagle Elk, Jacobs then grabbed the rifle laying against the car and struck Schreiner in the head with the rifle, knocking him to the ground. Jacobs then smashed the rifle butt over Schreiner's head again with sufficient force to break the stock of the rifle into two pieces.

Anthony Jacobs denied that he participated in any way in the altercation. According to Jacobs, it was Eagle Elk who, after striking Schreiner in the face with his fist and knocking him to the ground, struck Schreiner in the head a total of four times with the butt of the gun.

After his arrest,[2] Eagle Elk, upon the advice of counsel, volunteered to undergo a polygraph examination on July 23, 1981. Eagle Elk's counsel was not present while the examination was being conducted. The examination was conducted by a Federal Bureau of Investigation officer, Agent Diem. Prior to being given the polygraph, Eagle Elk was advised by Agent Diem of his *Miranda* rights, signed a form stating that he understood those rights, and signed a polygraph interview consent form. The examination was conducted outside the presence of Eagle Elk's counsel. According to Eagle Elk, after the polygraph examination was completed, Agent Diem advised him that he was not telling the truth, and continued the interrogation. The government admitted that appellant was not given an additional *Miranda* warning after the polygraph examination but prior to this interrogation. During this interrogation Eagle Elk made an incriminating statement to the effect that he had struck Schreiner twice in the head with the rifle. According to Eagle Elk he requested to see his attorney prior to making this incriminating statement. However, Agent Diem testified at a suppression hearing held October 13, 1981, that Eagle Elk had not requested to see his attorney until after the incriminating statement had been made.

Eagle Elk argues that under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), his incriminating statement allegedly made after requesting to see his counsel should have been suppressed. In *Edwards* the Supreme Court held that interrogation must cease when an accused requests counsel, and that an accused is not subject to further

[2] Eagle Elk was arrested on April 28, 1981. On April 25, 1981, the night of Schreiner's death, Eagle Elk had been interviewed by an investigator with the Oglala Sioux Tribal Police. Prior to this interview. Eagle Elk was fully advised of his constitutional rights. [Tr. 44]

interrogation unless he initiates further conversation with the police. *Id.* at 484-85, 101 S.Ct. at 1884-85. We do not believe *Edwards* controls the instant case in that at the suppression hearing the trial court accepted Agent Diem's testimony that Eagle Elk did not request an attorney until after he had made the incriminating statement. Such findings of fact by the trial court in suppression proceedings are subject to reversal only if they are found to be clearly erroneous, *see, e.g. United States v. Poitra*, 661 F.2d 98, 98 (8th Cir. 1981); *United States v. Doby*, 598 F.2d 1137, 1140 (8th Cir. 1979), and we cannot conclude on the basis of the record that the trial court made a clearly erroneous determination in the instant case.

However, Eagle Elk also contends that his incriminating statement should have been suppressed because, in the absence of an additional *Miranda* warning after the polygraph examination but prior to further interrogation, the statement must be viewed as not being voluntarily made. In light of this court's recent decision in *Fields v. Wyrick*, 682 F.2d 154 (8th Cir. 1982), we feel compelled to agree. In *Fields* this court reversed a rape conviction on the grounds that it was obtained as a result of an involuntary confession. The relevant circumstances in *Fields* are virtually identical to those in the instant case. Fields, upon the advice of counsel, consented to a polygraph examination to be conducted by an agent of the United States Army Criminal Investigation Division (CID). Fields' attorney was not present at the examination. Before the test was administered, Fields was fully advised of his constitutional rights and he signed a written form consenting to the polygraph examination. When the agent administering the examination advised Fields that the test indicated he was not telling the truth and subjected Fields to further interrogation without additional *Miranda* warnings, Fields made the incriminating

statement that he had engaged in consensual sexual intercourse with the eighty-one year old victim.

This court held that "Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation described above. Fields' incriminating statements were, therefore, not voluntarily made and should have been suppressed." *Fields v. Wyrick*, *supra*, at 158. Without engaging in an extensive discussion of the court's reasoning which led to this conclusion, we simply note that we are unable to distinguish the relevant factual circumstances presented by the instant case from those in *Fields*. Therefore, on the basis of this court's decision in that case, we reverse appellant's conviction for involuntary manslaughter, and remand to the district court with directions to order the release of the appellant or provide a new trial within a reasonable period of time.[3]

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[3] As noted previously, Eagle Elk has raised several other issues on this appeal relating to rulings made by the district court during trial proceedings. In light of our reversal of Eagle Elk's conviction, we need not reach these other assignments of error. However, because Eagle Elk may undergo a second trial, at least brief mention should be made of the appellant's challenges to a district court ruling precluding the appellant from using Anthony Jacobs' prior conviction on petty theft for impeachment purposes.

Jacobs' conviction stemmed from the theft of gunpowder from his father's garage. The district court, citing *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978), refused to allow defendant to impeach Jacobs on the basis of his conviction because it determined that petit theft did not involve "dishonesty or false statement" as required under Fed. R. Evid. 609(a)(2). *Cf. United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.), *cert. denied*, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143 (1977) (dicta—petit larceny not admissible under Rule 609(a)(2)); *Government of Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976) (petit larceny does not necessarily involve *crimen falsi* so as to be admissible for impeachment purposes). *But cf. United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979)

ROSS, Circuit Judge, specially concurring.

I concur in the result in this case only because I am firmly convinced that it is required by this court's recent broad holding in *Fields v. Wyrick*, *supra*. Nevertheless, for the reasons stated in my dissenting opinion in *Fields*, I am steadfast in my belief that *Fields* was wrongly decided and inconsistent with this court's prior decision in *United States v. Little Bear*, 583 F.2d 411 (8th Cir. 1978).

The majority's conclusion in *Fields v. Wyrick* that the defendant's confession was involuntary does not rest on considerations of coercive conduct by the polygraph administrator, Fields' age, intelligence, emotional condition, or any other factors which clearly would be relevant to a determination of whether he might not have voluntarily, knowingly, and intelligently made the incriminating statement or waived his right to have counsel present. Instead, the majority relies solely on the facts that: (1) polygraph interrogation inherently holds "significant potential for abuse," *see Fields v. Wyrick*, *supra*, at 159; (2) even though Fields submitted to the polygraph upon the advice of his counsel, was fully advised of his constitutional rights and signed a written consent to the polygraph examination, there was "no evidence that Fields or his lawyer anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination

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(petit larceny conviction could be used for impeachment); *United States v. Carden*, 529 F.2d 443, 446 (5th Cir.), *cert. denied*, 429 U.S. 848, 97 S.Ct. 134, 50 L.Ed.2d 121 (1976) (petit larceny admissible since it involved dishonesty). In the circumstances of this case we cannot conclude that the district court erred in refusing to admit Jacobs' prior petit theft convictions.

was run," *id.* at 160;[4] and (3) Fields was questioned immediately after administration of the polygraph without being reminded of his right against self-incrimination and his right to have counsel present. *Id.* at 160.

Thus, I am left with no alternative but to conclude that the majority in *Fields* has created a per se rule that, even though a defendant has been fully advised of his constitutional rights and has consented to a polygraph interrogation, his confession made after he has been advised that his polygraph examination shows deceit is involuntary unless the defendant is given an ad-

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[4] As I noted in my dissent in *Fields v. Wyrick*, 682 F.2d 154, at 162 (8th Cir. 1982) (Ross, J., dissenting), the following detailed statement of rights was read to Fields before the polygraph was administered:

> "Before I ask you any questions, you must understand your rights. *You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning.* This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. *If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate. Do you want a lawyer at this time?" Defendant answered "No."*

State v. Fields, 538 S.W.2d 348, 350 n.1 (Mo.Ct. App. 1976) (emphasis added).

Apparently, the majority in *Fields* has now engrafted an additional requirement that unless additional *Miranda* warnings are given after the polygraph but before further questioning, the initial *Miranda* warnings and waiver must be supplemented by not only advising the defendant that anything he says or does during the questioning may be used against him, and that he may stop answering questions or speak to a lawyer at any time, but must advise the defendant that questions may be asked after the polygraph examination had been completed.

ditional *Miranda* warning between the polygraph and the immediately subsequent questioning, or the government has explicitly advised the defendant prior to the polygraph that he may undergo questioning after the polygraph examination. Apparently, this rule obtains regardless of whether the defendant might be considered to understand completely his rights to remain silent and to have an attorney present at any time. *See Fields v. Wyrick, supra*, at 163 (Ross, J., dissenting). As I noted in *Fields*, the majority in *Fields* failed to offer convincing support for such a rule.[5]

Moreover, I believe that any attempt to distinguish the instant case from *Fields* would result in reliance on the kind of irrelevant factual differences which characterizes the majority's attempt in *Fields* to distinguish this court's prior opinion in *United States v. Little Bear, supra*. In *Little Bear* the defendant was questioned by BIA agents concerning her husband's death.

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[5] Although the majority in *Fields* refers to the Supreme Court's recent decision in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) as somehow providing some support for its holding in *Fields*, *see, e.g., Fields v. Wyrick*, supra, at 158, I am at a loss to see how *Edwards* has any relevance whatsoever to the questions presented in *Fields* or in the instant case. Moreover, the majority in *Fields* appears to admit this when it states: "The per se rule enumerated in *Edwards* does not resolve the issue present here," since Fields "initiated further dialogue with the authorities after his right to counsel had been invoked." *Fields v. Wyrick, supra*, at 158.

As the Supreme Court noted in *Edwards*

> *If *** in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and inteligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.*

She was fully advised of her constitutional rights and signed a waiver form. Two months later she was again questioned, this time by an FBI agent, and she consented to take a polygraph examination. Prior to taking the polygraph she was given a "Consent to be Interviewed with Polygraph" form which she signed. She was also advised by the agent of her constitutional rights and she signed that form's waiver provision. During the polygraph examination Little Bear was asked if she stabbed her husband. She responded in the affirmative and said she wanted to talk about it. At this point she was not reminded of her right to an attorney or to remain silent. Upon further interrogation, Little Bear signed a written confession. On appeal, Little Bear contended that the confession should have been suppressed because it was not voluntarily given under the circumstances. This court held that the trial court did not err in concluding that "Mrs. Little Bear had voluntarily confessed and knowingly and intelligently waived her rights even though no second, post-polygraph *Miranda* warning was given." 583 F.2d at 414.

In distinguishing *Little Bear*, the majority in *Fields* relied primarily on the fact that "Little Bear had not retained counsel when she went to take the polygraph," and therefore, "the Court was not required to determine whether the agent's procedure had deprived Little Bear of a previously asserted right to deal with the authorities through counsel." *Fields v. Wyrick*, *supra*, at 161, n. 13. However, it must be noted that Fields, although retaining counsel, had not asserted his right to counsel at the polygraph examination, and in fact, as the majority noted in *Fields*, must be viewed as having initiated the further dialogue with authorities. *Id.* at 158. As the Supreme Court's opinion in *Edwards v. Arizona* clearly indicates, in either the *Little Bear* factual circumstances or the *Fields* factual circumstances, the basic standard for determining the voluntariness of

the confession is the same, i.e., "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver is knowing and intelligent *** under the totality of the circumstances ***," 451 U.S. at 486 n.9, 101 S.Ct. at 1885 n.9 *See id.* at 482, 101 S.Ct. at 1883.

The majority in *Fields* also appears to have found some distinguishing significance in the label attached to and the wording of the form Little Bear signed in consenting to the polygraph examination. The FBI form which Little Bear signed was entitled "Consent to be Interviewed with Polygraph" and stated that she agreed to the "use of a polygraph *** during this interview or any part of it." *United States v. Little Bear, supra*, 583 F.2d at 412. The majority in *Fields* construed this form to somehow indicate a broader scope of consent to be interrogated than did the CID form in *Fields*.

First, it must be emphatically noted that there is absolutely no indication in the opinion in *Little Bear* that the court's decision even remotely turned on the wording of the FBI polygraph consent form. Furthermore, placing any legal or practical significance upon the use of the word "interview" in the FBI consent *form* used in *Little Bear* appears to raise inconsequential form over real substance.

Little Bear, *Fields* and the instant case all involve factual circumstances in which a defendant has clearly and fully been advised on at least two occasions prior to the administration of the polygraph of the constitutional rights to remain silent and to the presence of counsel during any questioning by the authorities. Furthermore, I can find no evidence in any of these cases that the defendants did not fully comprehend the meaning and the consequences of a waiver of those rights. As I stated in *Fields*, in these circumstances, "it is difficult to understand *** how one more recitation of *Miranda*

warnings would prove knowing and intelligent waiver if waiver of two prior sets of warnings, one of which was given minutes before [an incriminating statement is made] does not." *Fields v. Wyrick*, *supra*, at 163 (Ross, J., dissenting). Nevertheless, *Fields* seems to dictate that, in the circumstances of this case, another *Miranda* warnings should have been given between the polygraph examination and the following interrogation in order to find Eagle Elk's confession voluntary. For this reason, I am compelled to concur in the court's holding in the instant case that Eagle Elk's incriminating statement made during the post-polygraph questioning was not voluntarily made, and, consequently, his conviction obtained through the use of that statement must be reversed.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the per curiam opinion of the court only because *Fields v. Wyrick*, 682 F.2d 154 (8th Cir. 1982) requires this action. I agree with Judge Ross in his specially concurring opinion that *Fields v. Wyrick* is in conflict with *United States v. Little Bear*, 583 F.2d 411 (8th Cir. 1978). *Fields v. Wyrick*, *supra*, relies on *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) although, unlike *Henry*, it did not involve a defendant with limited mental ability. I agree with the reasoning in Judge Ross' specially concurring opinion. I am concerned that *Fields v. Wyrick* has created a per se rule that finds no waiver even when repeated *Miranda* warnings had been given.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CR 81-50050-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT EDWARD EAGLE ELK, JR. DEFENDANT.

TRANSCRIPT OF HEARINGS

Taken at
United States Courthouse
Rapid City, South Dakota
October 13, 1981

BEFORE HONORABLE ANDREW W. BOGUE, CHIEF JUDGE

* * * * *

[60] THE COURT: In view of the testimony given and the absence of any further testimony by the Defendant in this case, I would state this: First of all the Court did consider all the circumstances surrounding the statement, whether it is called an admission against interest or confession or not, and it doesn't appear that it would fall within the—well, I'm not going to say that. I will back off on that and say that whatever it is, a confession or admission, that this Court did consider the following circumstances, whether or not the Defendant knew of the nature of the offense which he is charged or which he has suspected at the time of making the confession; the Court did consider whether or not the Defendant was advised or knew he was not required to make any statement and any such statement would be used against him; and the Court further considered

whether or not the Defendant had been advised prior to questioning of his rights to assistance of counsel; the Court further considered the circumstances surrounding whether or not the Defendant was without assistance of counsel when questioned and when given such confession; the Court does find that the request for the polygraph was made [61] by counsel for the Defendant on behalf of the Defendant; the Court further finds that the giving of the polygraph test was voluntary.

The Court does not consider in its decision any statement on the part of any witness as to whether or not the Defendant has passed the polygraph test. I say "passed" advisably. The witness did say he felt that he—that the Defendant—was not telling the truth, or words to that effect, and that does not enter into this. It is not admissible in any Court of law to prove guilt of any Defendant, so I am not considering that.

I have some questions about polygraph tests anyway and the weight it should be given. This is not to be considered here and is not being considered here.

At any rate, the only reason it's allowed in was to show there was a test taken as part of the circumstances surrounding the obtaining of this admission or confession, whichever the case may be.

The attorney did not make any objection to the polygraph test being made in his absence. Also the Defendant did not object to the absence of his attorney while the polygraph test was being taken.

Now, the Court believes that the Miranda warnings were given properly by the party taking the statements, and the Court so finds. The court also finds that by giving a [62] statement, by discussing anything with the witness, Mr. Diem, that the Defendant knowingly and intelligently waived his privilege against self-incrimination.

Now, as to the statement which was given, the second statement, as opposed to the first statement, the Court finds that the Defendant did not request presence of his Counsel prior to the giving of the second statement. The Court further finds that the Defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed Counsel present at that particular interrogation; this Court further finds the the confession or statement, whichever it may be, or admission, was really voluntarily made. The Court under the law then grants the admission or will grant the admission of the statement into evidence, but will also instruct the jury properly as required by law.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

No. 81-2425

Filed October 5, 1982

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., a/k/a BOBBY BEAR, APPELLANT.

This appeal from the United States District Court for the ____ District of South Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment and commitment of the said District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court with directions to order release of the appellant or provide a new trial within a reasonable period of time in accordance with the opinion of this Court

JUNE 30, 1982

A True Copy:
Attest:

/s/ ROBERT D. ST. VRAIN
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1981

No. 81-2425

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., A/K/A BOBBY BEAR,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross and John R. Gibson would grant the petition for rehearing en banc.

August 27, 1982